No. 82-973

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

BARBARA E. ETKIND
Assistant to the Solicitor General

MARGARET J. PERRY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ANDRE M. SURENA
Office of the Legal Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

Whether the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, changed the standard an alien must meet in order to avoid deportation on the ground that he would be subject to persecution in the country of deportation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Introduction and summary of argument	7
Argument	10
The Refugee Act of 1980 did not change the standard an alien must meet in order to avoid deportation on the ground that he would be subject to persecution in the country of deportation	11
A. The United States traditionally has had a generous and compassionate refugee policy	11
B. Prior to the United States' accession to the United Nations Protocol in 1968, the Board of Immigration Appeals and the INS required an alien seeking withholding of deportation to prove a realistic likelihood that he would be subject to persecution in the country of deportation	20
C. The United States' accession to the United Nations Protocol in 1968 did not alter the standard by which an alien must establish that he would be eligible for withholding of deportation	25
D. Congress, in enacting the Refugee Act of 1980, did not intend to alter the standard for proving eligibility for withholding of deportation	36
E. The BIA's construction of the Refugee Act of 1980 as not having altered the standard by which an alien must prove eligibility for withholding of deportation is entitled to substantial deference	47
Conclusion	50
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Adamska, In re, 12 I. & N. Dec. 201 43
Bell v. *New Jersey*, No. 81-2125 (May 31, 1983) 41
Berdo v. *INS*, 432 F.2d 824 32
Bohmwald, In re, 14 I. & N. Dec. 408 ..... 31, 3a
Cheng Kai Fu v. *INS*, 386 F.2d 750, cert. denied, 390 U.S. 1003 ..... 24, 25, 29, 44
Chukumerije, In re, 15 I. & N. Dec. 520 29
Chumpitazi, In re, 16 I. & N. Dec. 629 ..... 29, 3a
Cisternas-Estay v. *INS*, 531 F.2d 155 44
Coriolan v. *INS*, 559 F.2d 993 ..... 31, 32
Daniel v. *INS*, 528 F.2d 1278 31
Diaz, In re, 10 I. & N. Dec. 199 25
Dunar, In re, 14 I. & N. Dec. 310 ..... 22, 28, 34, 47
Exilus, In re, Interim Dec. No. 2914 (BIA Aug. 3, 1982) 48
Fiallo v. *Bell*, 430 U.S. 787 11
Fleurinor v. *INS*, 585 F.2d 129 ..... 31, 1a
Francois, In re, 15 I. & N. Dec. 534 ..... 29, 3a
Gena v. *INS*, 424 F.2d 227 ..... 31, 2a
Haig v. *Agee*, 453 U.S. 280 21
Henry v. *INS*, 552 F.2d 130 ..... 31, 1a
Howe v. *Smith*, 452 U.S. 473 21
INS v. *Wang*, 450 U.S. 139 21
Ishak v. *District Director*, 432 F. Supp. 624 44
Janus and Janek, In re, 12 I. & N. Dec. 866 ..... 23, 24, 25
Joseph, In re, 13 I. & N. Dec. 70 ..... 31, 32
Kashani v. *INS*, 547 F.2d 376 ..... 5, 22, 30, 44, 47, 1a
Kasravi v. *INS*, 400 F.2d 675 ..... 24, 29
Khalil v. *INS*, 457 F.2d 1276 ..... 2a
Kojoory, In re, 12 I. & N. Dec. 215 25
Kovac v. *INS*, 407 F.2d 102 ..... 31, 32
Lam, In re, Interim Dec. No. 2857 (BIA Mar. 24, 1981) 21, 48
Lena v. *INS*, 379 F.2d 536 ..... 24, 25, 29
Leng May Ma v. *Barber*, 357 U.S. 185 13
Lorillard v. *Pons*, 434 U.S. 575 22
Maccaud, In re, 14 I. & N. Dec. 429 31
Marroquin-Manriquez v. *INS*, 699 F.2d 129, petition for cert. pending, No. 82-1649 21

Cases—Continued

	Page
Martineau v. *INS*, 556 F.2d 306	31
Martinez-Romero, In re, Interim Dec. No. 2872 (BIA June 30, 1981), aff'd, 692 F.2d 595	21, 48
McMullen, In re, 17 I. & N. Dec. 542, rev'd on other grounds, 658 F.2d 1312	21, 22, 48
Ming v. *Marks*, 367 F. Supp. 673, aff'd, 505 F.2d 1170	30
Mladineo, In re, 14 I. & N. Dec. 591	31, 3a
Muskardin v. *INS*, 415 F.2d 865	29
Nagy, In re, 11 I. & N. Dec. 888	22, 23
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267	47
Paul v. *INS*, 521 F.2d 194	31
Pereira-Diaz v. *INS*, 551 F.2d 1149	31, 1a
Perez, In re, 10 I. & N. Dec. 603	22
Pierre v. *United States*, 547 F.2d 1281, vacated and remanded on other grounds, 434 U.S.	30
Raass v. *INS*, 692 F.2d 596	22
Rejaie v. *INS*, 691 F.2d 139	21, 25, 48, 49
Reyes v. *INS*, 693 F.2d 597	22
Rosa v. *INS*, 440 F.2d 100	44, 2a
Sadeghzadeh v. *INS*, 393 F.2d 894	24
Salama, In re, 11 I. & N. Dec. 536	23
Shkukani v. *INS*, 435 F.2d 1378, cert. denied, 403 U.S. 920	44, 2a
Shubash v. *INS*, 450 F.2d 345	44
Sihasale, In re, 11 I. & N. Dec. 759	22, 23, 25
Surzycki, In re, 13 I. & N. Dec. 261	4a
Taheri, In re, 14 I. & N. Dec. 27, on remand, 14 I. & N. Dec. 35	44
Tan, In re, 12 I. & N. Dec. 564	42
Towne v. *Eisner*, 245 U.S. 418	21
Udall v. *Tallman*, 380 U.S. 16	47
Ugricic, In re, 14 I. & N. Dec. 384	43
United States v. *Clark*, 454 U.S. 555	47
Vardjan, In re, 10 I. & N. Dec. 567	25
Williams, In re, 16 I. & N. Dec. 697	31, 3a
Zamora v. *INS*, 534 F.2d 1055	31, 2a

Treaties, statutes and regulations:

United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150	14, 33

Treaties, statutes and regulations—Continued Page

United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 ..... *passim*
19 U.S.T. 6225 ..... 14, 15
19 U.S.T. 6261 15
19 U.S.T. 6276 14
19 U.S.T. 6275 15

Immigration and Nationality Act, 8 U.S.C. (& Supp. V) 1101 *et seq.*:
Section 103, 8 U.S.C. 1103 14
Section 103(a), 8 U.S.C. 1103(a) 47
Section 201(a), 8 U.S.C. (Supp. V) 1101(a)(42) 17
Section 201(a), 8 U.S.C. (Supp. V) 1101(a)(42)(A) 39
Section 201(a), 8 U.S.C. (Supp. V) 1101(a)(42)(B) 18
Section 203, 8 U.S.C. (& Supp. V) 1153 14
Section 203(a)(7), 8 U.S.C. 1153(a)(7) 10, 12, 13, 16, 17, 42, 43, 45, 46
Section 203(a)(7)(A)(i), 8 U.S.C. 1153(a)(7)(A)(i) 12
Section 203(g), 8 U.S.C. 1153(g) 12
Section 203(h), 8 U.S.C. 1153(h) 12
Section 207, 8 U.S.C. (Supp. V) 1157 .....16, 17, 44
Section 207(a)(1), 8 U.S.C. (Supp. V) 1157(a)(1) 17
Section 207(a)(2), 8 U.S.C. (Supp. V) 1157(a)(2) 17
Section 207(a)(3), 8 U.S.C. (Supp. V) 1157(a)(3) 18
Section 207(b), 8 U.S.C. (Supp. V) 1157(b).... 17
Section 207(c)(1), 8 U.S.C. (Supp. V) 1157(c)(1) 18
Section 208, 8 U.S.C. (Supp. V) 1158..... 16, 19
Section 208(a), 8 U.S.C. (Supp. V) 1158(a).... 19
Section 208(b), 8 U.S.C. (Supp. V) 1158(b).... 19
Section 209(a), 8 U.S.C. (Supp. V) 1159(a).... 17, 19, 21

Treaties, statutes and regulations—Continued Page

Section 209(b), 8 U.S.C. (Supp. V) 1159(b).... 19
Section 212(d)(5), 8 U.S.C. 1182(d)(5) 12, 13
Section 212(d)(5)(B), 8 U.S.C. (Supp. V) 1182(d)(5)(B) 16, 36
Section 243(h), 8 U.S.C. (1964 ed.) 1253(h).. 13
Section 243(h), 8 U.S.C. 1253(h) .....*passim*
Section 243(h), 8 U.S.C. (Supp. V) 1253(h).. 21, 47
Section 243(h)(1), 8 U.S.C. (Supp. V) 1253(h)(1) 2, 20
Section 244(a)(1), 8 U.S.C. 1254(a)(1) 21
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.* .....*passim*
Section 101, 94 Stat. 102 36
Section 201(b), 94 Stat. 103 .....16, 17, 19
Section 203(e), 94 Stat. 107 20
Pub. L. No. 89-236, Section 11(f), 79 Stat. 918 13
8 C.F.R. Part 3:
Section 3.1(b)(2) 48
Section 3.1(d)(2) 48
Section 3.1(h) 48
Section 3.2 5
8 C.F.R. Part 100:
Section 108 (1975) 14
Section 108.3 (1981) 23
8 C.F.R.:
Section 205.1(a)(2) 2
Section 208 19
Section 208.3 21
Section 208.5 (1982) 23
Section 208.8(e) 19
Section 242.17(c) (1965) 22
Section 242.17(c) 22, 48

Miscellaneous:

Admission of Refugees Into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 19

Miscellaneous—Continued Page

Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 37, 41
Briefing on the Growing Refugee Problem: Implications for International Organizations: Hearing Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. (1979) 45
114 Cong. Rec. (1968):
p. 27757 ..... 26, 28
p. 29391 26
p. 29607 26
p. 29608 ..... 8, 15
125 Cong. Rec. H11967 (daily ed. Dec. 13, 1979) .. 38
125 Cong. Rec. (1979):
p. 4881 11
p. 23234 46
p. 23240 ..... 16, 45
126 Cong. Rec. (daily ed. Mar. 4, 1980):
p. H1520 40
p. H1521 38
126 Cong. Rec. (1980):
p. 3757 39
p. 3758 39
46 Fed. Reg. 45117 (1981) 14
Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva, 1979) 33, 34, 35
H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 1979) .. 10, 13, 16, 19, 20, 37, 39, 40, 45
H.R. Rep. No. 96-781, 96th Cong., 2d Sess. (1980) .. 39
H.R. Rep. No. 97-890 (Pt. 1), 97th Cong., 2d Sess. (1983) 41
Martin, "*The Refugee Act of 1980: Its Past and Future*, 1982 Mich. Yearbook of Int'l Legal Studies 91 12

Miscellaneous—Continued Page

Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979).. 16, 18-19, 36, 39-40

The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. (1979) 39, 40

The Refugee Act of 1979, S. 643: Hearing Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 16, 19, 36

S. Exec. Doc. K, 90th Cong., 2d Sess. (1968) 7, 11, 15, 26, 27

S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 1968).... 11, 25, 26, 27, 28

S. Rep. No. 96-256, 96th Cong., 1st Sess. 1979)..... 19, 36, 38, 39, 40, 45

S. Rep. No. 96-590, 96th Cong., 2d Sess. (1980)..... 15, 39

United Nations Economic and Social Council's *Report of the Ad Hoc Committee on Statelessness and Related Problems* (Feb. 17, 1950) (E/1618; E/AC 32/5) (*reprinted in* 11 U.N. ESCOR, Annex (Agenda Item 32), U.N. Doc. E/1618 and Corr. 1 (1950) 34

U.S. Refugee Programs: Hearing Before the Senate Comm. on the Judiciary, 96th Cong., 2d Sess. (1980) 45

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-973

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-25a) is reported at 678 F.2d 401. The order of the court of appeals denying rehearing (Pet. App. 1a-3a) is not reported. The decisions of the Board of Immigration Appeals (Pet. App. 27a-36a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a) was entered on May 5, 1982, and a petition for rehearing was denied on July 29, 1982 (Pet. App. 1a-3a). On October 22, 1982, Justice Marshall extended the time in which to file a petition for a writ of certiorari to and including December 10, 1982. The petition for a writ of certiorari was filed on December 10, 1982, and was granted on February 28, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. (Supp. V) 1253(h)(1) provides in pertinent part:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

1. Respondent is a 32-year old native and citizen of Yugoslavia. He entered the United States on June 8, 1976, as a nonimmigrant visitor authorized to remain until July 25, 1976. Because he stayed in this country beyond that date without permission, deportation proceedings were instituted against him in November 1976. At the deportation hearing, respondent admitted deportability and requested and was granted the privilege of voluntarily departing the United States by February 16, 1977. Respondent designated Yugoslavia as the country to which he wished to be deported. Pet. App. 5a-6a; R. 179, 182, 184-185.[1]

Respondent did not leave this country by February 16, 1977. Rather, in January 1977, he married a United States citizen, who filed a visa petition on his behalf. The Immigration and Naturalization Service approved the visa petition on April 5, 1977. Five days later, however, respondent's wife was killed in an automobile accident, which automatically revoked the INS's approval of the visa petition. See 8 C.F.R. 205.1(a)(2). Respondent requested the district director of the INS to reinstate the approval, but that request was denied on August 11, 1977, and respondent was ordered to surrender for deportation. Pet. App. 6a-7a; R. 159-160.

---

[1] "R." refers to the certified administrative record in the court of appeals.

2. Instead of surrendering or seeking review of the district director's decision, respondent moved to reopen his deportation proceedings in order to apply for withholding of deportation under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h).[2] Respondent alleged that he feared persecution and imprisonment if he were returned to Yugoslavia because of his friendship with members of, and assistance in the work of, Ravna Gora, an anticommunist organization, and because his father-in-law, who was a member of Ravna Gora, had been imprisoned in Yugoslavia on account of his anticommunist activities when he visited there as a tourist in 1974. Respondent submitted his affidavit in support of these allegations. Pet. App. 7a-8a; R. 156.[3] Respondent explained that he had not requested withholding of deportation at his deportation hearing, and had designated Yugoslavia as the country to which he wished to be deported at that time, because he did not become involved in anticommunist activities until his marriage, which occurred after he had been found deportable.[4]

On October 17, 1979, an immigration judge denied respondent's motion to reopen his deportation proceedings. Characterizing respondent's affidavit as self-serving and conclusory, the judge held that respondent had failed

---

[2] The version of Section 243(h) that was in effect in 1977, when respondent filed his first motion to reopen, is set forth in note 10, *infra*.

[3] While his motion to reopen was pending before the immigration judge, respondent also applied to the district director for asylum. The district director denied respondent's application on August 1, 1979 (Pet. App. 8a).

[4] This explanation is not wholly convincing. Respondent subsequently testified that he knew his late wife for six months prior to their marriage in January 1977. Transcript of July 27, 1981 proceedings on respondent's habeas corpus petition, at 42. Accordingly, respondent is likely to have been aware of the circumstances surrounding his future father-in-law's imprisonment in Yugoslavia when he designated that country as the country to which he wished to be deported during his December 1976 deportation proceeding. Nevertheless, respondent did not mention his future wife or her father during his deportation hearing. See R. 176-183.

to provide any substantial evidence that he would be subjected to persecution in Yugoslavia. Pet. App. 8a; R. 150-152.

On January 18, 1980, the Board of Immigration Appeals dismissed respondent's appeal from the immigration judge's decision and denied respondent's motion to reopen (Pet. App. 32a-36a). The Board noted (*id.* at 34a-35a) that "[a] motion to reopen based on a section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual [alien]." It concluded that respondent had failed to make the required showing because evidence of his membership in Ravna Gora, his father-in-law's incarceration in Yugoslavia, and the conviction in Yugoslavia of an unrelated American citizen associated with an anticommunist organization did not prove that respondent himself would be singled out for persecution if he returned to Yugoslavia. Pet. App. 35a-36a.[5] Respondent did not seek review of this decision of the Board.

3. In February 1981, the INS again ordered respondent to surrender for deportation. Once again, respondent neither complied nor sought an extention of time. He was arrested by INS officers in Chicago on July 17, 1981, and flown to New York for deportation. While awaiting a connecting flight to Yugoslavia, respondent attempted to escape. Accordingly, he was detained by the INS and his deportation was rescheduled. Pet. App. 8a-9a.

On July 21, 1981, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. The district

---

[5] On appeal to the Board of Immigration Appeals, respondent presented a newspaper clipping that reported that another Yugoslav, an American citizen unrelated to respondent, had been sentenced to five years' imprisonment in Yugoslavia. Respondent also submitted a copy of the oath of allegiance that he had taken when he joined an anticommunist organization in February 1977 and a declaration in which he stated his reasons for joining the organization. Pet. App. 28a-29a; R. 148-149.

court limited its review to the question whether the district director had abused his discretion by refusing to reinstate approval of the visa petition filed by respondent's late wife on his behalf. The district court concluded there had been no abuse of discretion and denied respondent's petition. Pet. App. 9a.

While detained by the INS, respondent also filed a second motion to reopen his deportation proceedings in order to renew his request for withholding of deportation under Section 243(h). On September 3, 1981, the Board denied respondent's motion (Pet. App. 27a-31a). The Board observed that although the basis for respondent's second motion to reopen—that he would be persecuted in Yugoslavia because of his associations with the Ravna Gora organization—was identical to that of his prior motion to reopen, respondent had made no showing that the evidence submitted in support of his second motion was unavailable to him and could not have been discovered or presented at a former hearing or that conditions in Yugoslavia had changed substantially since the earlier motion (*id.* at 30a). See 8 C.F.R. 3.2; *Kashani* v. *INS*, 547 F.2d 376, 380 (7th Cir. 1977).[6]

In addition, the Board held that respondent had failed to make a prima facie showing that he would be singled out for persecution if he were deported to Yugoslavia. Pet. App. 31a. The Board noted (*ibid.*) that "[a] motion to reopen based on a Section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual * * *." The Board concluded that respondent had failed to make the required showing because the journalistic articles submitted by respondent (see note 6) were "of a general nature, referring to political con-

[6] In support of respondent's second motion to reopen, he submitted various articles describing the political conditions in Yugoslavia in general and several affidavits of individual Yugoslavs who averred that respondent would be imprisoned if he returned to Yugoslavia. R. 27-139.

ditions in Yugoslavia, but not specifically relating to the respondent," and the affidavits and petitions submitted by individual Yugoslavs (see *ibid.*) "express an opinion [that respondent will be imprisoned if he returns to Yugoslavia] but provide no direct evidence to link the respondent's activities in this country and the probability of his persecution in Yugoslavia." Pet. App. 31a.[7]

4. In a consolidated proceeding in the court of appeals, respondent appealed the district court's denial of his habeas petition and sought review of the Board's most recent denial of his motion to reopen. The court of appeals upheld the district court's denial of respondent's petition (Pet. App. 10a-11a). However, the court of appeals reversed the Board's denial of respondent's motion to reopen, concluding that the Board had applied too stringent a standard in evaluating respondent's claim of persecution in support of his request for withholding of deportation (*id.* at 11a-25a).

While acknowledging that "the matter is hardly free from doubt" (Pet. App. 12a), the court of appeals held that the enactment of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, represented the culmination of a process, which had begun with the United States' accession in 1968 to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, of modifying the standard applicable to requests for relief under Section 243(h). Pet. App. 21a. In the court's view (*id.* at 14a), the " 'well-founded fear of persecution' " language con-

---

[7] Respondent also had claimed that if he returned to his home town, Gnjilane, Yugoslavia, he, as a Serbian, would be killed by the Albanians, who constituted a majority in the province and were attempting to secede from Yugoslavia. The Board rejected this claim as well, finding that "there is nothing to stop the respondent from going to another town in Yugoslavia should he feel threatened in his hometown. A respondent is deported to [a] country, not a city or province." Pet. App. 31a.

tained in the Protocol "seems considerably more generous than the 'clear probability' test applied under Section 243(h)." Accordingly, without providing any additional guidance concerning the content of the new standard,[8] the court concluded (Pet. App. 23a) that "under Section 243(h), deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution." It remanded the case to the Board for a "plenary hearing under the legal standards established by the Protocol." Pet. App. 25a (footnote omitted), 26a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States traditionally has had one of the most generous and compassionate refugee programs of any nation. Even before accession to the United Nations Protocol Relating to the Status of Refugees in 1968 and passage of the Refugee Act of 1980, several statutory and regulatory provisions of our immigration laws permitted aliens who feared persecution abroad either to be admitted to this country or, once here, to avoid deportation to a country of persecution. Indeed, it was because of the "American heritage of concern for the homeless and persecuted and our traditional role of leadership in promoting assistance for refugees" (S. Exec. Doc. K, 90th Cong., 2d Sess. III (1968)) that we were able to

---

[8] The court expressly left the formulation of an appropriate standard for development on an ad hoc, case-by-case basis (Pet. App. 24a):

> It would be unwise to attempt a more detailed elaboration of the applicable legal test under the Protocol. It emphasizes the fear of the applicant as well as the reasonableness of that fear. Its further development must await concrete factual situations as they arise. That development can be informed by traditional indices of legislative intent, by the [Office of the United Nations High Commissioner for Refugees'] *Handbook [on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979)] and by experience.

accede to the United Nations Protocol "without prejudice to national or state law" (114 Cong. Rec. 29608 (1968) (remarks of Sen. Proxmire)).

The provision with which this case is primarily concerned, Section 243(h) of the Immigration and Nationality Act, authorizes withholding of deportation of aliens within the United States who wish to avoid deportation to a country in which their lives or freedom would be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group. Since at least the early 1960s, an alien seeking such relief was required to show a realistic likelihood—denominated by the courts as a "clear probability"—that he would be subject to such persecution if deported. The Second Circuit has held that, by Congress's use of the words "well-founded fear" of persecution in the Refugee Act of 1980, if not by our accession in 1968 to the Protocol, which contains the identical language, that burden of proof has now been altered.

As we show below, however, the words "clear probability" and "well-founded fear" are not self-explanatory, but when they are read in the context in which they have been used it becomes obvious that there is no significant difference between them. Moreover, the unambiguous intent underlying both accession to the Protocol in 1968 and passage of the Refugee Act of 1980 was *not* to change the standard for eligibility for withholding of deportation relief. In view of this explicit legislative desire to maintain the status quo, and the recognition that the various verbal formulations for the burden of proof can only be understood in the context of their actual applications, we begin with the pre-1968 standard for proving eligibility for withholding of deportation relief.

A.

Prior to the United States' accession to the Protocol in 1968, an alien seeking withholding of deportation was required to substantiate his subjective fear of persecution

with objective facts demonstrating a realistic likelihood that he would be singled out for persecution. Such evidence could take the form of, for example, proof of previous persecution of the individual alien or persecution of his family, evidence of persecution of all or virtually all members of a group to which the alien belonged, or evidence of activities engaged in by the alien after he left a country that indicated a likelihood that he would be persecuted if he returned there. Whereas the Board of Immigration Appeals and the INS generally described the foregoing showing as a "likelihood of persecution," the courts frequently denominated it a "clear probability of persecution."

B.

The United States' accession to the Protocol was neither intended to change, nor construed as changing, the foregoing burden of proof. To the contrary, accession was based on the express understanding that such action would not alter or enlarge the substance of our immigration laws since, it was believed, the principles and directives contained in the Protocol already were incorporated in United States law. Accession instead was intended as a symbol and as encouragement to other nations to treat refugees in the same salutary manner in which the United States already dealt with those within its territory.

Largely in reliance on this express basis for accession, during the period between 1968 and the enactment of the Refugee Act in 1980, both the Board and the courts construed the "well-founded fear" language contained in the Protocol as not having altered the standard by which an alien was required to prove eligibility for withholding of deportation. Even those cases that did not expressly hold that accession had made no change in the applicable standard nevertheless continued to use the phrases "likelihood of persecution" and "clear probability of persecution" interchangeably with the Protocol's "well-founded fear" terminology, thus indicating no significant

differences among the various formulations. Regardless of the semantic standard applied, an alien seeking withholding of deportation remained under an obligation to show, by objective evidence, a realistic likelihood that he would be singled out for persecution if deported.

C.

Congress's explicit intent in enacting the portions of the Refugee Act with which this case is concerned was simply to conform United States law to the terms of the Protocol. Specifically, Congress amended Section 243(h) "for the sake of clarity, to conform the language of that section to the [1951 United Nations] Convention [Relating to the Status of Refugees, Articles 2 through 34 of which are incorporated by reference in the Protocol]." H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 18 (1979). Similarly, the new definition of "refugee" was added to the Act to conform to that contained in the Protocol by eliminating the geographical and ideological limitations imposed by former Section 203(a)(7), 8 U.S.C. 1153(a)(7).

Since Congress's sole purpose, in enacting the relevant portions of the Refugee Act, was to incorporate the provisions of the Protocol, and since accession to the Protocol had not been intended to alter the substance of our immigration laws, it follows that the Refugee Act did not change the standard by which an alien was required to prove eligibility for withholding of deportation. Similarly, the fact that the words "well-founded fear," as used in the Protocol, had been consistently construed as equivalent to the pre-1968 standard conclusively refutes any suggestion that Congress's use of that phrase in the Refugee Act was intended to denote a departure from that standard.

D.

Following enactment of the Refugee Act, the Board has continued to use the phrases "likelihood of persecution" and "clear probability of persecution," as well as "well-founded fear of persecution," thus signifying its under-

standing that the legislation did not alter the standard by which an alien is required to establish eligibility for relief under Section 243(h). This construction of the Act by the agency charged with its administration is entitled to substantial deference.

The court of appeals' holding (Pet. App. 23a) that the Refugee Act requires withholding of deportation under Section 243(h) upon a showing "far short of a 'clear probability' " that an alien will be singled out for persecution attributes a stringency to the phrase "clear probability" that ignores how it has been applied in practice. The decision below thus liberalizes substantially the standard by which aliens' withholding and asylum claims must be assessed. This ruling is in direct contravention of the intent underlying both the United States' accession to the Protocol and the enactment of the Refugee Act and should not be accepted by this Court.

ARGUMENT

THE REFUGEE ACT OF 1980 DID NOT CHANGE THE STANDARD AN ALIEN MUST MEET IN ORDER TO AVOID DEPORTATION ON THE GROUND THAT HE WOULD BE SUBJECT TO PERSECUTION IN THE COUNTRY OF DEPORTATION

A. The United States Traditionally Has Had A Generous And Compassionate Refugee Policy

1. Perhaps because of our Nation's history and heritage, "few, if any, countries have been as generous as the United States in extending the privilege to immigrate, or in providing sanctuary to the oppressed" (*Fiallo* v. *Bell*, 430 U.S. 787, 795 & n.6 (1977)). See also 125 Cong. Rec. 4881 (1979) (remarks of Sen. Kennedy); S. Exec. Doc. K, 90th Cong., 2d Sess. III (1968); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4, 6 (1968). Even before the enactment of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, several statutory provisions and regulations of our immigration laws permitted aliens who feared persecution either to be ad-

mitted to this country or, once here, to avoid deportation to a country of probable persecution.

Relief for aliens seeking to come to the United States because of persecution in their homelands was available under Section 203(a)(7) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(7), which permitted the "conditional entry" as immigrants of 17,400 refugees annually.[9] Those seeking entry under this provision were required to show, *inter alia*, that, because of persecution or fear of persecution on account of race, religion, or political opinion, they had fled from a Communist or Communist-dominated country or area or from any country in the Middle East. 8 U.S.C. 1153(a)(7)(A)(i). Aliens who arrived as conditional entrants were required to report back to the INS after two years for reinspection and reexamination for admission into the United States. 8 U.S.C. 1153(g). An alien who passed that review would be "regarded as lawfully admitted to the United States for permanent residence as of the date of his arrival." 8 U.S.C. 1153(h).

Because of the numerical and other limitations on entry under Section 203(a)(7), another provision of the Act, Section 212(d)(5), 8 U.S.C. 1182(d)(5), also was used to bring refugees into this country. That section granted the Attorney General discretion to "parole" aliens into the United States "temporarily * * * for emergent reasons or for reasons deemed strictly in the public interest." 8 U.S.C. 1182(d)(5). Parole, however, was not regarded as an "admission" of the alien and when, in the opinion of the Attorney General, the purposes of the parole had been served, the alien was to be returned

---

[9] As originally enacted, Section 203(a)(7) made 10,200 admissions available annually to refugees. By the end of 1978, Congress had amended the Immigration and Nationality Act to provide a single worldwide preference system, and refugees then claimed 17,400 admissions annually. D. Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 Mich. Yearbook of Int'l Legal Studies 91, 116 n.11.

to the custody from which he had been paroled. Thereafter, his case would be dealt with "in the same manner as that of any other applicant for admission to the United States." *Ibid.* This provision was first used in 1956, in response to the Hungarian crisis, and was used thereafter by successive administrations to parole large numbers of refugees into the United States. H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 3-4 (1979).

By contrast to Sections 203(a)(7) and 212(d)(5), Section 243(h) of the Act, 8 U.S.C. 1253(h), the provision with which this case is primarily concerned, applied to aliens already in this country who wished to avoid deportation. Section 243(h) authorized the Attorney General to withhold the deportation of an alien if, in the Attorney General's judgment, "the alien would be subject to persecution on account of race, religion, or political opinion."[10] Withholding of deportation was available only to those aliens who were already "within the United States" and subject to deportation proceedings. Such relief thus was not available to aliens who were not considered to be admitted to the United States or who were at our borders applying for admission to, and refuge in, this country. See *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958) (alien paroled into this country under 8 U.S.C. 1182(d)(5) not "within the United States" for purposes

---

[10] 8 U.S.C. 1253(h) provided:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

From 1952 to 1965, Section 243(h) authorized the withholding of deportation of only those aliens who would be subject to "physical persecution" in the country of deportation. 8 U.S.C. (1964 ed.) 1253(h). In 1965, Congress amended the section by substituting the words "persecution on account of race, religion, or political opinion" for the words "physical persecution." Pub. L. No. 89-236, Section 11(f), 79 Stat. 918.

of Section 243(h)). By its terms, Section 243(h) provided only temporary relief; the Attorney General was authorized to withhold deportation of an alien only "for such period of time as he deem[ed] to be necessary" for reasons of persecution. 8 U.S.C. 1253(h). Moreover, withholding of deportation relief afforded no affirmative right to remain in this country, but only a right not to be deported to a particular country or countries. Finally, unlike Section 203, Section 243(h) contained no provision for eventual adjustment to lawful permanent resident status.

Prior to the enactment of the Refugee Act of 1980, there was no statutory provision whereby aliens at our borders or within this country (but not yet the subject of deportation proceedings) could apply for asylum. Nevertheless, in 1974, the Attorney General, pursuant to his general authority to administer and enforce the immigration laws (8 U.S.C. 1103), promulgated a regulation that permitted aliens to apply to an INS district director or American consul for "asylum." 8 C.F.R. 108 (1975).[11]

2. In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, which requires (19 U.S.T. 6225) all parties to undertake to apply Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.[12] Article 33.1 of the Convention provides (19 U.S.T. 6276):

> No Contracting State shall expel or return * * * a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, national-

---

[11] This regulatory provision was revoked in 1981 (see 46 Fed. Reg. 45117) after the Refugee Act of 1980 created a statutory scheme for the granting of asylum (see pages 18-19, *infra*).

[12] The United States is not a party to the Convention itself.

> ity, membership of a particular social group or political opinion.[13]

Article 1.2 of the Protocol, largely incorporating by reference Article 1A(2) of the Convention, in turn defines a "refugee" as one who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

19 U.S.T. 6225, 6261. Because of the "American heritage of concern for the homeless and persecuted and our traditional role of leadership in promoting assistance for refugees" (S. Exec. Doc. K, 90th Cong., 2d Sess. III (1968)) already reflected in our immigration laws, the United States was able to accede to the Protocol "without prejudice to national or state law" (114 Cong. Rec. 29608 (1968) (remarks of Sen. Proxmire)).

3. In the Refugee Act of 1980, Congress made extensive revisions in the immigration laws in order to establish a permanent systematic procedure for the admission of refugees to the United States and for their resettlement once here. S. Rep. No. 96-590, 96th Cong., 2d Sess. 1 (1980).

The Refugee Act was the product of congressional dissatisfaction and frustration with the ad hoc, piecemeal and discriminatory nature of the conditional entry procedure and the consequent use by the Attorney General

---

[13] Article 32.1 of the Convention (19 U.S.T. 6275) extends broader relief (a general right not to be expelled) to refugees *lawfully* within the territory of a contracting party: "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

of his "parole" power (which had been designed to be used only on an individual, case-by-case basis) to bring in large numbers of refugees.[14] Congress responded to these concerns by eliminating entirely the conditional entry provision for aliens fleeing from Communist or Middle Eastern countries contained in Section 203(a)(7) of the Act, 8 U.S.C. 1153(a)(7), and by placing stringent restrictions on the Attorney General's authority to "parole" refugees into the United States.[15] In their stead, Congress created new statutory provisions dealing with refugees seeking admission to this country. Pub. L. No. 96-212, Sec. 201(b), 94 Stat. 103.

Under new Section 207, 8 U.S.C. (Supp. V) 1157, a certain number of aliens who are screened and selected overseas may be brought to the United States under the

---

[14] See, *e.g.*, *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 1 (1979) (remarks of Rep. Holtzman) ("our refugee policy up to this time has been haphazard and inadequate. Current programs are the result of ad hoc responses of our Government to refugee crises that have existed throughout the world—in Hungary, Cuba, Eastern Europe, or Indochina"); *The Refugee Act of 1979, S. 643: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 1 (remarks of Sen. Kennedy) ("[f]or too long our policy toward refugee assistance has been ad hoc, with refugees being admitted in fits and starts, and after long delays and great human suffering * * *"), 10-11, 69-70 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 2, 5 (1979); 125 Cong. Rec. 23240 (1979) (remarks of Sen. Boschwitz) ("[o]ur policy today lacks consistency and planning. We respond to crises on a case-by-case basis with no established policy or statute that guides our actions").

[15] In Congress's view, the addition to the Act of new Sections 207 and 208 described in the text eliminated the need for the Attorney General to parole large groups of refugees into the United States. Accordingly, it amended the parole provision to require the Attorney General, prior to paroling an alien who is a refugee, to make a determination that "compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under [Section 207]." 8 U.S.C. (Supp. V) 1182(d)(5)(B).

new status of "refugees." Pub. L. No. 96-212, Sec. 201(b), 94 Stat. 103. Like conditional entrants under former Section 203(a)(7), "refugees" under Section 207 must submit to reinspection by the Immigration and Naturalization Service after an initial period before gaining permanent resident alien status. However, the period before adjustment to permanent resident status is reduced from two years to one. 8 U.S.C. (Supp. V) 1159(a). Moreover, unlike the 17,400 numerical limitation on conditional entrants under repealed Section 203(a)(7), new Section 207 permitted "refugee" admissions of up to 50,000 per year for fiscal years 1980 through 1982. 8 U.S.C. (Supp. V) 1157(a)(1).[16] For subsequent fiscal years, the numerical ceiling must be fixed by Presidential determination. 8 U.S.C. (Supp. V) 1157(a)(2). During each fiscal year, an additional number of refugees may be admitted if the President determines, in consultation with Congress, that an unforeseen emergency situation exists, that the admission to the United States of additional refugees is justified by grave humanitarian concerns or is otherwise in the national interest, and that their admission cannot be accomplished within the refugee admission ceiling established before the beginning of the fiscal year. 8 U.S.C. (Supp. V) 1157(b).

Most significantly, the geographical and ideological requirements for conditional entry were repealed and a definition of "refugee" that incorporates the definition contained in the United Nations Protocol was, for the first time, included in the Act (8 U.S.C. (Supp. V) 1101(a)(42)):

---

[16] The Act authorized entries beyond these numerical limitations if the President determined, after consultation with Congress and before the beginning of the fiscal year, that admission of a specific number of refugees in excess of 50,000 was justified by humanitarian concerns or was otherwise in the national interest. 8 U.S.C. (Supp. V) 1157(a)(1). For fiscal years 1980, 1981 and 1982 the President in fact made such determinations and approved the admission of more than 50,000 refugees in each of those years.

> The term "refugee" means (A) any person who is outside the country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion * * *.[17]

Finally, admission numbers are to be allocated among categories of refugees in accordance with a determination made by the President after consultation with Congress. 8 U.S.C. (Supp. V) 1157(a)(3). The actual admission of individual refugees remains the responsibility of the Attorney General. 8 U.S.C. (Supp. V) 1157(c)(1).

In response to criticism that the bill, as originally proposed, contained no provision for asylum,[18] the Judiciary

---

[17] As noted above, the definition of refugee quoted in the text incorporates the definition of refugee contained in the United Nations Protocol Relating to the Status of Refugees to which the United States had acceded in 1968. See pages 14-15, *supra*. The 1980 legislation went further than the Protocol, however, in, among other things, recognizing that, "in special circumstances," one can be a refugee within, as well as outside of, his country of nationality. 8 U.S.C. (Supp. V) 1101(a)(42)(B) thus defines the term refugee to include, "in such special circumstances as the President after appropriate consultation [with Congress] may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

The final sentence of 8 U.S.C. (Supp. V) 1101(a)(42)(B) precludes one who himself has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" from qualifying for refugee status.

[18] See, *e.g.*, *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of*

Committees of both Houses included a provision dealing with asylum claims. See S. Rep. No. 96-256, 96th Cong., 1st Sess. 9 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 17-18 (1979). Under new Section 208, 8 U.S.C. (Supp. V) 1158, the Attorney General is directed to establish procedures whereby any alien physically present in the United States or at a land border or port of entry, regardless of the legality of his status, may apply for "asylum" in this country. Pub. L. No. 96-212, Sec. 201(b), 94 Stat. 103.[19] The threshold test for eligibility for asylum is the alien's meeting the new statutory definition of "refugee." See 8 U.S.C. (Supp. V) 1159(a). But while the Act directs the Attorney General to establish procedures whereby aliens may apply for asylum, the decision whether to grant a particular asylum application remains discretionary with the Attorney General. 8 U.S.C. (Supp. V) 1158(a). In addition, asylee status may be terminated if the conditions that rendered the alien eligible for asylum change. 8 U.S.C. (Supp. V) 1158(b). The Attorney General thus has provided that aliens who are granted asylum must be examined by the INS each year in order to determine if they continue to be eligible for asylum. 8 C.F.R. 208.8(e). Furthermore, in any year only 5,000 aliens who have been granted asylum may have their status adjusted to that of permanent resident alien. 8 U.S.C. (Supp. V) 1159(b).

Finally, the withholding of deportation provision contained in Section 243(h), 8 U.S.C. 1253(h) (see note 10,

---

the House Comm. on the Judiciary, 96th Cong., 1st Sess. 170, 174, 187-188, 190, 250, 364, 384 (1979); *The Refugee Act of 1979, S. 643: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 52, 182 (1979). See also *Admission of Refugees Into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977).

[19] Such procedures have been promulgated and are codified at 8 C.F.R. 208.

supra), was amended to conform to Article 33 of the United Nations Convention. H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 18 (1979). The Attorney General accordingly is prohibited from deporting or returning any alien to a country where his "life or freedom would be threatened" on account of "race, religion, nationality, membership in a particular social group, or political opinion." Pub. L. No. 96-212, Sec. 203(e), 94 Stat. 107.[20]

B. Prior To The United States' Accession To The United Nations Protocol In 1968, The Board Of Immigration Appeals And The INS Required An Alien Seeking Withholding Of Deportation To Prove A Realistic Likelihood That He Would Be Subject To Persecution In The Country Of Deportation

The issue in this case concerns the meaning of the phrase "well-founded fear of persecution" in the Refugee Act of 1980.[21] As with any case involving the interpreta-

---

[20] 8 U.S.C. (Supp. V) 1253(h)(1) provides:

> The Attorney General shall not deport or return an alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

The amendments to Section 243(h) thus make explicit that the Attorney General has a mandatory duty not to deport or return an alien eligible for withholding of deportation and that the provision is applicable to exclusion as well as deportation proceedings and to aliens who would be subject to persecution on account of nationality or membership in a particular social group, as well as those who would be persecuted because of race, religion or political opinion.

[21] We note that, by its own terms, Section 243(h) of the Act, 8 U.S.C. (Supp. V) 1253(h), suggests no change in the standard by which an alien must prove eligibility for withholding of deportation, since it neither includes nor incorporates by reference the "well-founded fear" language on which the court of appeals based its decision. (Section 243(h), as amended by the Refugee Act, prohibits the deportation or return of an alien to any country in which his life or freedom "would be threatened * * * on account of race, religion, nationality, membership in a particular social group,

tion of an Act of Congress, the Court's task is to discern and give effect to legislative intent. The usual starting place for such an endeavor is the language of the statute itself. See *Haig* v. *Agee*, 453 U.S. 280, 290 (1981); *Howe* v. *Smith*, 452 U.S. 473, 480 (1981). Here, however, the critical statutory language is far from plain; the words "well-founded fear of persecution," like the words "extreme hardship" (8 U.S.C. 1254(a)(1)), "are not self-explanatory." *INS* v. *Wang*, 450 U.S. 139, 144 (1981). As the Third Circuit observed in *Rejaie* v. *INS*, 691 F.2d 139, 146 (1982) (Pet. App. 53a), quoting *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.), such a phrase "'is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'" We agree with the Third Circuit (*Rejaie* v. *INS*, *supra*, 691 F.2d at 146 (Pet. App. 53a)) that, when read "within the circumstances of [their] use," the phrases "clear probability" and "well-founded fear" are equivalent. Hence, Congress in passing the Refugee Act did not intend to liberalize the standard applicable to claims for withholding of deportation on grounds of persecution.[22]

---

or political opinion"). As noted above (page 19, *supra*), however, "well-founded fear" is the criterion for eligibility for asylee status (8 U.S.C. (Supp. V) 1159(a)). The Board has held that the standards for eligibility for asylum and withholding of deportation are identical notwithstanding that asylum is discretionary with the Attorney General and withholding relief under Section 243(h) is mandatory for an eligible alien. See *In re Martinez-Romero*, Interim Dec. No. 2872 (BIA June 30, 1981), slip op. 6, aff'd, *Martinez-Romero* v. *INS*, 692 F.2d 595 (9th Cir. 1982); *In re Lam*, Interim Dec. No. 2857 (BIA Mar. 24, 1981), slip op. 4-5; *In re McMullen*, 17 I. & N. Dec. 542, 544 (BIA 1980), rev'd on other grounds, *McMullen* v. *INS*, 658 F.2d 1312 (9th Cir. 1981); see also 8 C.F.R. 208.3 (asylum requests filed with the immigration court "shall also be considered as requests for withholding exclusion or deportation pursuant to section 243(h) of the Act").

[22] Accord, *Marroquin-Manriquez* v. *INS*, 699 F.2d 129, 133 (3d Cir. 1983), petition for cert. pending, No. 82-1649 (filed Apr. 7,

In seeking guidance as to the meaning of the words "well-founded fear of persecution," it is appropriate at the outset to consider the construction that has been placed on that phrase in the United Nations Protocol. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). Moreover, inquiry into the Protocol's use of the same words is required by Congress's express intent, by enactment of the Refugee Act, to conform United States law to our international obligations under the Protocol. See pages 36-40, *infra*. In turn, as we show below (pages 25-28), this country's accession to the Protocol in 1968 was predicated on the explicit understanding that such action would not alter or enlarge the substance of our immigration laws. Accordingly, we begin with an examination of the pre-1968 standard for eligibility for withholding of deportation.

An alien seeking withholding of deportation or asylum always had the burden of proving that he would be subject to persecution in the country of deportation. *In re Nagy*, 11 I. & N. Dec. 888, 889 (BIA 1966); *In re Sihasale*, 11 I. & N. Dec. 759, 760-762 (BIA 1966); *In re Perez*, 10 I. & N. 603, 605 (BIA 1964).[23] More spe-

---

1983); *Kashani* v. *INS*, 547 F.2d 376, 379 (7th Cir. 1977); *In re Dunar*, 14 I. & N. Dec. 310, 319-320 (BIA 1973); see also *Raass* v. *INS*, 692 F.2d 596 (9th Cir. 1982) (post-Refugee Act case applying standard of "probable political persecution as decided under the heretofore decided cases"); *McMullen* v. *INS*, 658 F.2d 1312 (9th Cir. 1981) (post-Refugee Act case applying "likelihood of persecution" standard). Contra, *Reyes* v. *INS*, 693 F.2d 597, 599-600 (6th Cir. 1982) (relying on the decision under review).

[23] 8 C.F.R. 242.17(c) (1965) provided in relevant part:

> The [applicant for withholding of deportation] has the burden of satisfying the special inquiry officer that he would be subject to physical persecution as claimed.

Current Section 242.17(c) provides:

cifically, the INS's assessment of an alien's case consistently focused on whether his alleged fear of persecution was supported by objective facts that demonstrated a realistic likelihood that he would be singled out for persecution. The applicant thus was required not only to state his subjective fears of persecution but also to substantiate them with objective evidence. That evidence could take various forms, such as proof of previous persecution of the individual alien or persecution of his family,[24] evidence of persecution of all or virtually all members of a group or class to which the alien belonged,[25] or evidence of activities engaged in by the alien

---

> The [applicant for withholding of deportation] has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, or political opinion as claimed.

See also 8 C.F.R. 208.5 (1982); 8 C.F.R. 108.3 (1981).

[24] Compare *In re Janus and Janek*, 12 I. & N. Dec. 866 (BIA 1968) (Czechoslovakian anti-communists who were convicted and sentenced, in absentia, on charges of "Defection from the Republic" entitled to withholding of deportation), with *In re Nagy*, 11 I. & N. Dec. 888, 889-890 (BIA 1966) (withholding of deportation to Hungary not justified on religious grounds, in the absence of evidence that alien's parents, who also were devout practicing Catholics, had ever been subject to persecution in Hungary, or on grounds of political opinion, in the absence of evidence of any political activity by the alien either in Hungary or the United States); and *In re Sihasale*, 11 I. & N. Dec. 759, 761-762 (BIA 1966) (rejecting Indonesian citizen's claim that she would be subject to persecution by communists if returned to Indonesia because of her prior employment with an agency of the United States government, in view of the elimination of the Communist Party as an organized political force in that country and the absence of any evidence of persecution of the alien (before she left Indonesia) or her family (who remained in Indonesia)).

[25] Compare *In re Salama*, 11 I. & N. Dec. 536 (BIA 1966) (evidence of a government campaign that was responsible for the departure of some 37,000 Jews from Egypt since 1954, and evidence that the Medical Association of Egypt had advised the Egyptian populace to refrain from consulting Jewish physicians and that

after he had left a country that indicated a likelihood that he would be persecuted if he returned.[26] Whatever type of evidence was proffered, however, had to provide some indication that the particular alien would be singled out for persecution upon his return.[27]

But while the nature of the evidence—its conclusory or subjective quality—could preclude the granting of withholding relief, the identity of its proponent could not. That is, the Board recognized that the alien's "own testimony may be the best—in fact the only—evidence available to her." Such evidence, therefore, "must * * * be

---

Jewish professionals had been dropped from the rolls of professional societies justified the granting of an application for withholding of deportation to Egypt of a Jew), with *Sadeghzadeh* v. *INS*, 393 F.2d 894, 896 (7th Cir. 1968) ("rumors" and "common knowledge" of persecution of Catholics in Iran insufficient basis for withholding of deportation); and *Lena* v. *INS*, 379 F.2d 536 (7th Cir. 1967) (Turkish alien not entitled to withholding of deportation because of his Greek Orthodox faith, where such discrimination as exists in Turkey is against the Greek church rather than against individuals).

[26] Compare *In re Janus and Janek, supra*, 12 I. & N. Dec. at 871, 874-876 (Czechoslovakian alien who "ma[de] no claim that he ever publicly denounced the [Communist] Party or its goals" while in Czechoslovakia entitled to withholding of deportation on the basis of his defection and consequent conviction and sentence in absentia), with *Kasravi* v. *INS*, 400 F.2d 675, 676-677 (9th Cir. 1968) (holding that the BIA did not abuse its discretion in denying application for withholding of deportation of Iranian who had been "vociferous and vehement in his criticism of the Shah here in the United States," because the State Department had concluded that "an Iranian student would not in all likelihood be persecuted for activities in the United States").

[27] See *Cheng Kai Fu* v. *INS*, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968) (aliens not entitled to withholding of deportation to Hong Kong since "[t]heir status in Hong Kong as exiles from the mainland of China will not distinguish them from thousands of others, and the physical hardship or economic difficulties they claim they will face will be shared by many others. Those difficulties do not amount to the kind of particularized persecution that justifies [withholding] of deportation").

accorded the most careful and objective evaluation possible, in the light of all available pertinent evidence * * *." *In re Sihasale*, 11 I. & N. Dec. 759, 762 (BIA 1966).

The Board and the INS generally described the foregoing showing as a "likelihood of persecution." See, *e.g.*, *In re Janus and Janek*, 12 I. & N. Dec. 866, 873 (BIA 1968); *In re Kojoory*, 12 I. &. N. Dec. 215, 220 (BIA 1967); *In re Vardjan*, 10 I. & N. Dec. 567, 571, 579 (BIA 1964); *In re Diaz*, 10 I. & N. Dec. 199, 202 (BIA 1963). The courts, on the other hand, frequently denominated the required showing as a "clear probability of persecution." See *Cheng Kai Fu* v. *INS*, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Lena* v. *INS*, 379 F.2d 536, 538 (7th Cir. 1967). In so doing, however, the courts gave no indication that they intended the "clear probability" phraseology to represent any more stringent a standard than the Board's "likelihood of persecution" formulation did. Thus, as the Third Circuit noted in *Rejaie* v. *INS*, *supra*, 691 F.2d at 146 (Pet. App. 52a), the court below "attributed a stringency to the phrase 'clear probability'" that is inconsistent with the Second Circuit's own observations in *Cheng Kai Fu* v. *INS*, *supra*, 386 F.2d at 753 (emphasis added) that "[i]n order to forestall deportation the aliens must show *some evidence* indicating they would be subject to persecution" and that they had failed to make the required showing of a *"likelihood* of persecution."

C. The United States' Accession To The United Nations Protocol In 1968 Did Not Alter The Standard By Which An Alien Must Establish That He Would Be Eligible For Withholding Of Deportation

1. The Senate gave its advice and consent to the United States' accession to the United Nations Protocol in 1968 on the express understanding that such action would not alter or enlarge the substance of our immigration laws. See S. Exec. Rep. No. 14, 90th Cong., 2d Sess.

4, 6, 7, 10 (1968); S. Exec. Doc. K, 90th Cong., 2d Sess. III, VIII (1968). Specifically, Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs of the United States Department of State, assured the Senate Foreign Relations Committee (S. Exec. Rep. No. 14, *supra*, at 6) that

> accession does not in any sense commit the Contracting State to enlarge its immigration measures for refugees. Rather, the asylum concept is set forth in its prohibition under Article 33 of the Convention against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in a territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol, without amendment of the Act.

Thereafter, the Committee reported favorably on the Protocol and recommended that the Senate give its advice and consent to accession. Similarly, the President and the Secretary of State advised the Senate (S. Exec. Doc. K, *supra*, at III, VII) that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." Accord, S. Exec. Rep. No. 14, *supra*, at 2; 114 Cong. Rec. 29391 (1968) (remarks of Sen. Mansfield).[28] With express

---

[28] Because there appeared to be a conflict between Article 29.1 of the Convention and United States revenue laws dealing with the taxation of nonresident aliens, and between Article 24 of the Convention and certain United States social security laws, the United States acceded to the Protocol subject to two reservations. See 114 Cong. Rec. 29607 (1968). Senator Proxmire advised the Senate (*id.* at 27757; emphasis added) that the "[r]eservations in-

reference to Section 243(h), the Secretary of State explained (S. Exec. Doc. K, *supra*, at VIII):

> [F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened. This article is comparable to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1254 [*sic*], and it can be implemented within the administrative discretion provided by existing regulations.

Accession thus never was intended to alter the substance of our immigration laws. Rather, in view of this country's long-standing tradition of concern and action on behalf of refugees, it was believed that the principles and directives contained in the Protocol already were incorporated in United States law. S. Exec. Rep. No. 14, *supra*, at 4 ("refugees in the United States have long enjoyed the protection and the rights which the protocol calls for"), 6, 7 ("the United States already meets the standards of the Protocol"); S. Exec. Doc. K, *supra*, at III, VII. Accession was intended as a symbol and as encouragement to other nations to treat refugees within their borders in the same salutary manner in which the United States already dealt with those within its territory. S. Exec. Doc. K, *supra*, at III, IV, VIII; S. Exec. Rep. No. 14, *supra*, at 4, 7, 10.

In this respect, accession was thought to be a particularly appropriate action for the United States to take in 1968, which had been designated International Year for Human Rights by the United Nations and Human Rights Year in the United States (S. Exec. Doc. K, *supra*, at III).

> Our accession would convey to the rest of the world in a timely and conspicuous manner, and I

---

cluded in the [Secretary of State's] Letter of Submittal remove *even the slightest possible conflict* between Federal and State law and provisions of the Convention and protocol."

> cannot think of a more timely opportunity, the image of our traditional concern for refugees and for the individual human being which have long been embodied in our laws and consecrated in our traditions.
>
> In our view, it is particularly desirable, therefore, that the United States accede during this International Year for Human Rights.

S. Exec. Rep. No. 14, *supra*, at 4. See also 114 Cong. Rec. 27757 (1968) (remarks of Sen. Proxmire) ("[s]urely [ratification of the Protocol] is the least the Senate can do during this year dedicated to internationalizing human rights").

2. In view of the foregoing unequivocal evidence of legislative intent, both the courts and the Board construed the "well-founded fear" language of the Protocol as not altering the standard by which an alien was required to prove eligibility for withholding of deportation. In *In re Dunar*, 14 I. & N. Dec. 310, 319 (1973), the Board explained that the requirement that the fear be " 'well-founded' " meant that the alien still must substantiate his subjective fear of persecution with objective facts. Thus, as was the case before accession (see pages 22-25, *supra*), "[t]he claimant's own testimony as to the facts will sometimes be all that is available; but the crucial question is whether the testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted." 14 I. & N. Dec. at 319. Relying largely (*id.* at 319-320; see also *id.* at 314-318) on the legislative history of accession discussed above, the Board concluded (14 I. & N. Dec. at 230):

> It is clear that when it accepted the Protocol, the Senate had no notion that this would work a drastic alteration of section 243(h) and the gloss which it had acquired through the years before this Board and in the courts.

The Board accordingly rejected the applicant's contention that "[t]his change in terminology [to well-founded

fear of persecution] relieves the alien of the burden of showing a clear probability of persecution." 14 I. & N. Dec. at 319.[29] See also *In re Chumpitazi*, 16 I. & N. Dec. 629, 631 (BIA 1978); *In re Francois*, 15 I. & N. Dec. 534, 538 (BIA 1975); *In re Chukumerije*, 15 I. & N. Dec. 520, 522-523 (BIA 1975).

---

[29] Having concluded (14 I. & N. Dec. at 319-320) that the Protocol's "well-founded fear" terminology represented no substantive change from the "clear probability" formulation, the Board next held (*id.* at 320; emphasis added) that "there is no substantial difference in the *coverage* of section 243(h) and Article 33." That is, the Board was satisfied that the differences between Section 243(h), which applied to "persecution on account of race, religion, or political opinion," and Articles 1 and 33, which refer, in addition, to "nationality" and "membership of a particular social group," and between Section 243(h) and Article 1, which refer to persecution, and Article 33, which does not mention persecution but rather forbids expulsion of a refugee to a place where his "life or freedom will be threatened," were "clearly reconcilable" and that any "distinctions in terminology can be reconciled on a case-by-case consideration as they arise" (14 I. & N. Dec. at 320-321).

Finally, the Board concluded (14 I. & N. Dec. at 321-323) that the mandatory quality of Article 33 required no change in the nature of the determination made by the Attorney General under Section 243(h). Although the latter provision was cast in discretionary terms and had been construed by the courts as affording the Attorney General a degree of discretion in decisionmaking thereunder (see, *e.g.*, *Muskardin* v. *INS*, 415 F.2d 865, 866 (2d Cir. 1969); *Kasravi* v. *INS*, 400 F.2d 675, 677-678 (9th Cir. 1968); *Cheng Kai Fu* v. *INS*, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Lena* v. *INS*, 379 F.2d 536, 537 (7th Cir. 1967)), the Board was aware of no case in which "a finding has been made that the alien has established the clear probability that he will be persecuted and in which section 243(h) withholding has nevertheless been denied in the exercise of administrative discretion." 14 I. & N. Dec. at 322; see also *id.* at 323. The Board thus suggested (*id.* at 322) that "in referring to the Attorney General's 'broad discretion' under section 243(h), the cases contemplate the manner in which the Attorney General arrives at his opinion and the limited scope of judicial review, rather than the eligibility-discretion dichotomy." Accord, *In re Francois*, 15 I. & N. Dec. 534, 536 (BIA 1975).

The question whether accession to the Protocol affected the alien's burden of proving persecution was also explicitly addressed in *Kashani* v. *INS*, 547 F.2d 376 (7th Cir. 1977). There, too, the court rejected the alien's contention (*id.* at 379) that, in view of this country's accession to the Protocol, "he does not need to show a clear probability of prosecution [*sic*]" (*ibid.*):

> We hold that an alien claiming a "well founded fear of persecution" must either demonstrate that he actually has been a victim of persecution or that his fear is more than a matter of his own conjecture. * * *
>
> This requirement can only be satisfied by objective evidence that the alien's assertions are correct. Thus, the "well founded fear" standard contained in the Protocol and the "clear probability" standard which this court has engrafted onto section 243(h) will in practice converge.[30]

See also *Pierre* v. *United States*, 547 F.2d 1281, 1288 (5th Cir.), vacated and remanded on other grounds, 434 U.S. 962 (1977); *Ming* v. *Marks*, 367 F. Supp. 673, 677 (S.D.N.Y. 1973), aff'd, 505 F.2d 1170 (2d Cir. 1974).

Even where they did not expressly hold that accession to the Protocol did not alter the standard for establishing eligibility for withholding of deportation, the courts, the Board and the INS continued to use the phrases "clear probability of persecution" and "likelihood of persecution," and to use them interchangeably with the "well-

---

[30] The Second Circuit attempted (Pet. App. 18a) to minimize the force of the decision in *Kashani* by asserting that the court there "was presented with the extravagant claim that the Protocol has shifted the inquiry entirely to an assessment of the applicant's subjective state of mind." But the court below mischaracterized the alien's claim in *Kashani* as being based solely on his *subjective* fears. As the Seventh Circuit's opinion makes clear (547 F.2d at 379), the alien had conceded the authority of the Attorney General, under the Protocol, "to determine whether [the alien's] state of mind is reasonable," an inquiry that surely is not "entirely * * * subjective."

founded fear of persecution" terminology, thus indicating no significant differences among the various formulations.[31] Hence, regardless of the label by which it was

---

[31] See, *e.g.*, *Fleurinor* v. *INS*, 585 F.2d 129, 132-134 (5th Cir. 1978) ("well-founded fear" used by immigration judge; "likelihood" and "probable persecution" used by court); *Martineau* v. *INS*, 556 F.2d 306, 307 & n.2 (5th Cir. 1977) ("'clear probability' of persecution" and "likelihood of persecution"); *Henry* v. *INS*, 552 F.2d 130, 131-132 (5th Cir. 1977) ("probable persecution," "reason to fear persecution" and "well-grounded fear of political persecution"); *Pereira-Diaz* v. *INS*, 551 F.2d 1149, 1154 (9th Cir. 1977) ("well-founded fear"); *Zamora* v. *INS*, 534 F.2d 1055, 1058 (2d Cir. 1976) ("likelihood of persecution" used by court, "well founded fear" used by Board); *Daniel* v. *INS*, 528 F.2d 1278, 1279 (5th Cir. 1976) ("probability of persecution"); *Paul* v. *INS*, 521 F.2d 194, 200 & n.11 (5th Cir. 1975) ("well-founded fear of political persecution"); *Gena* v. *INS*, 424 F.2d 227, 232 (5th Cir. 1970) ("likely to be persecuted"); *Kovac* v. *INS*, 407 F.2d 102, 105, 107 (9th Cir. 1969) ("probability of persecution" and "likelihood"); *In re Williams*, 16 I. & N. Dec. 697, 700-702, 704 (BIA 1979) ("well-founded fear," "'probable persecution'" and "likelihood of persecution"); *In re Mladineo*, 14 I. & N. Dec. 591, 592 (BIA 1974) ("well-founded * * * fear of persecution"); *In re Maccaud*, 14 I. & N. Dec. 429, 434 (BIA 1973) ("reasonable fear" and "well-founded fear"); *In re Bohmwald*, 14 I. & N. Dec. 408, 409 (BIA 1973) ("well-founded fear of persecution"); *In re Joseph*, 13 I. & N. Dec. 70, 72, 74 (BIA 1968) ("clear probability of persecution" and "likelihood of persecution").

Notwithstanding this surfeit of case law recognizing no change in the standard by which an alien must prove eligibility for withholding of deportation, the Second Circuit relied (Pet. App. 18a) on isolated phrases taken out of context from the Fifth Circuit's decision in *Coriolan* v. *INS*, 559 F.2d 993 (1977). The full paragraph from which the court below culled the language on which it relied reads as follows (*id.* at 997; emphasis added):

> We do *not* suggest that the Protocol profoundly alters American refugee law. We do believe that our adherence to the Protocol *reflects or even augments* the seriousness of this country's commitment to humanitarian concerns, even in this stern field of law. It may be appropriate to add that the foreign policy of the United States has recently become more dramatically focused in the protection of human rights around the world.

As noted above (pages 25-28, *supra*), the express intent behind this country's accession to the Protocol was indeed to *reflect* our

characterized, the same type of objective showing continued to be required of an applicant for withholding of deportation after the United States acceded to the Protocol in 1968; the alien remained under an obligation to demonstrate, by objective facts, a realistic likelihood that he would be singled out for persecution upon his return to the country of deportation.[32]

---

traditional commitment to humanitarian concerns with respect to refugees and to augment the *seriousness* of that commitment (but not the legal commitment itself) by undertaking an international obligation to do what we already were doing as a matter of domestic law. Moreover, the result reached by the court in *Coriolan*—remand for reconsideration by the BIA—was based on a newly available Amnesty International report, not on any judicially perceived change in the alien's burden of proof. 559 F.2d at 1004.

[32] Thus, after accession to the Protocol as before, an alien would be granted withholding of deportation relief if he could demonstrate that he or his family had been persecuted in his homeland or that he had engaged in activities after leaving his homeland that indicated a likelihood of persecution if he returned. See, *e.g.*, *Berdo* v. *INS*, 432 F.2d 824 (6th Cir. 1970) (BIA erred in denying withholding of deportation relief to Hungarian who had participated in street fighting against the Russian Military Occupation Forces in 1956 during which, he publicly admitted since his departure from Hungary, he had killed a Russian soldier); *Kovac* v. *INS*, 407 F.2d 102, 105 (9th Cir. 1969) (Yugoslavian crewman who had been discriminated against in Yugoslavia because of his Hungarian extraction and because of his refusal to inform on the activities of the Hungarian underground could not be denied withholding of deportation simply because other crewmen who remained in this country after their ships had departed had not been persecuted upon their eventual return to Yugoslavia, since an alien is "entitled to a determination based upon the probability of persecution of himself, not of others"); *In re Joseph*, 13 I. & N. Dec. 70, 72 (BIA 1968) (Haitian alien who was active politically against the Duvalier regime until his departure from Haiti, who had been imprisoned on three occasions by the Duvalier regime and, while incarcerated, had suffered beatings from which scars remained on his body demonstrated that "he would be singled out as an individual by the governmental authorities and suffer persecution therefrom" if returned to Haiti). It also remained true that an alien who could not demonstrate a likelihood that he would be singled out for persecution if he returned to his homeland, either by evidence that he or his family had been persecuted, evidence

3. In concluding that the "well-founded fear of persecution" language contained in the 1980 Act mandates withholding of deportation "upon a showing far short of a 'clear probability' that an individual will be singled out for persecution," the court of appeals relied heavily (Pet. App. 15a, 23a-24a) on the *Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979) issued by the Office of the United Nations High Commissioner for Refugees (UNHCR). That reliance was wholly misplaced.

First, since the *Handbook* was not even issued until September 1979, whereas hearings on the Refugee Act were held in March and May 1979 and the Senate Judiciary Committee issued its report in July 1979, it is most unlikely that Congress's use of the words "well-founded fear of persecution" was informed by the UNHCR's interpretation of that phrase as contained in the Protocol.[33] In addition, the UNHCR itself acknowledged (*Handbook, supra*, at 1; see also *id.* at 3-4) that "[t]he assessment as to who is a refugee, *i.e.* the determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee finds himself at the time he applies for recognition of refugee status." It thus offered the *Handbook* simply "for the guidance of government officials concerned with the determination of refugee status in the

---

that all or virtually all of the members of a group to which he belonged had been persecuted, or evidence of activities in which he had engaged since leaving his homeland that indicated a likelihood of persecution if he returned, would not be granted withholding of deportation relief. See Appendix, *infra*, 1a-4a, for a representative sample of post-accession cases in which withholding of deportation was denied.

[33] Additional hearings on the Act were held on September 19 and 25, 1979, and the House Judiciary Committee's report was dated November 9, 1979. Nevertheless, we have found no mention of the *Handbook* anywhere in the legislative history.

various Contracting States" (*Handbook*, *supra*, at 2; see also *id.* at 4, 53).

In any event, the *Handbook*'s interpretation of the phrase "well-founded fear" as used in the Protocol does not support the court of appeals' conclusion that Congress's inclusion of the same language in the Refugee Act altered the standard by which an alien is required to prove eligibility for withholding of deportation. The UNHCR recognized (*Handbook*, *supra*, at 47 ¶ 196) the "general legal principle that the burden of proof lies on the person submitting a claim." Moreover, the UNHCR, like the Board in *In re Dunar*, *supra*, focused (*Handbook*, *supra*, at 11-12) on the requirement that the subjective condition—the element of fear—be "well-founded." This implied to the UNHCR, as it had to the Board (*In re Dunar*, *supra*, 14 I. & N. Dec. at 319-320),

> that it is not only the frame of the mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation.

Handbook, *supra*, at 11-12. Hence, like the pre-Protocol standard described above (pages 22-25), the term "well-founded fear" also "contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration." *Handbook*, *supra*, at 12, ¶ 38.[34]

---

[34] The United Nations Economic and Social Council's *Report of the Ad Hoc Committee on Statelessness and Related Problems* 39 (Feb. 17, 1950) (E/1618; E/AC 32/5) (*reprinted in* 11 U.N. ESCOR, Annex (Agenda Item 32) at 11, U.N. Doc. E/1618 and Corr. 1 (1950)) supports the view that the "well-founded fear of persecution" standard, like the previous formulations, includes objective as well as subjective elements. That report defines the expression " 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' " as meaning "that a person has either been actually a victim of persecution or can show good reason why he fears persecution." *Ibid.*

Indeed, many of the factors that the UNHCR mentioned (*Handbook*, *supra*, at 12, ¶¶ 40-41) as bearing on even the *subjective* element are precisely those on which the INS, the Board, and the courts always have focused in evaluating an alien's application for withholding of deportation, *i.e.*, the strength of his political or religious convictions, "the personal and family background of the applicant, his membership in a particular racial, religious, national, social or political group * * * and his personal experiences." The UNHCR counseled further (*Handbook*, *supra*, at 13, ¶ 43) that an assessment of whether an alien's fear is justified and reasonable also must take into account:

> What, for example, happened to his friends and relatives and other members of the same racial or social group * * *. The laws of the country of origin, and particularly the manner in which they are applied will be relevant. * * * In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, e.g., a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is "well-founded."

Furthermore, as has always been the case, "[t]he situation of each person must * * * be assessed on its own merits." *Ibid.* The UNHCR thus recognized (*id.* at 13, ¶ 45; emphasis added) that an applicant for refugee status under the Protocol must continue to show "good reason why *he individually* fears persecution." Therefore, even if the *Handbook's* interpretation of the phrase "well-founded fear" as used in the Protocol were dispositive, it is sufficiently equivalent to the criteria that the courts and immigration authorities traditionally have employed in evaluating withholding and asylum claims (see pages 22-25, *supra*) to dispel the notion that the inclusion of the "well-founded fear" language in the Refugee Act was intended to alter that preexisting standard.

D. Congress, In Enacting The Refugee Act Of 1980, Did Not Intend To Alter The Standard For Proving Eligibility For Withholding Of Deportation

1. As we have shown (pages 15-18, *supra*), the focus of the Refugee Act of 1980 was on the regularization of the *admission* of refugees to this country and on their successful resettlement and absorption once here. S. Rep. No. 96-256, *supra*, at 2-3, 5 (1979) (emphasis added) ("[t]he central feature of S. 643 is the establishment of statutory provisions for the *admission* of refugees).[35] To those ends, Congress adopted the unified admissions policy described above (pages 16-18, *supra*), whereby virtually all refugees admitted to the United States enter pursuant to 8 U.S.C. (Supp. V) 1157 under numerical limitations set by the President in consultation with Congress, with parole no longer employed for refugees except when the Attorney General determines, in a particular case, that it is required for "compelling reasons in the public interest" (8 U.S.C. (Supp. V) 1182 (d)(5)(B)).

By contrast, Congress evinced no intent to alter the law concerning aliens already within this country or at its borders who desired to avoid deportation or return to

---

[35] See also *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 1 (1979); *The Refugee Act of 1979, S. 643: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 2, 8, 39 (1979); 125 Cong. Rec. 23232 (1979) (remarks of Sen. Kennedy).

Title I of the Refugee Act of 1980, Pub. L. No. 96-212, Section 101, 94 Stat. 102, contains a Congressional Declaration of Policies and Objectives. Subsection (b) provides (8 U.S.C. (Supp. V) 1521 note):

> The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.

a country in which they feared persecution. See generally *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 6 (1981). Rather, by both amending Section 243(h) and, for the first time, including in the Act a provision for asylum, Congress expressly intended simply to conform United States domestic law to reflect its international obligations under the United Nations Protocol. The House Report, which states this intent clearly, is worth quoting at length (H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 17-18 (1979); emphasis added):

> *Asylum and Withholding of Deportation*
>
> Since 1968, the United States has been a party to the United Nations Refugee Protocol which incorporates the substance of the 1951 U.N. Convention of Refugees and which seeks to insure fair and humane treatment for refugees within the territory of the contracting states.
>
> Article 33 of the Convention, with certain exceptions, prohibits contracting states from expelling or returning a refugee to a territory where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion. *The Committee Amendment conforms United States statutory law to our obligations under Article 33 in two of its provisions:*
>
> (1) *Asylum.*—The Committee Amendment establishes for the first time a provision in Federal law specifically relating to asylum. • • •
>
> Currently, United States asylum procedures are governed by regulations promulgated by the Attorney General under the authority of section 103 of the Immigration and Nationality Act (see 8 CFR 108), which grants the Attorney General authority to administer and enforce laws relating to immigration. No specific statutory basis for United States asylum policy currently exists. The asylum provision of this legislation would provide such a basis.

The Committee wishes to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law, and feels it is both necessary and desirable that United States domestic law include the asylum provision in the instant legislation. * * *

(2) *Withholding of Deportation.*—Related to Article 33 is the implementation of section 243(h) of the Immigration and Nationality Act. That section currently authorizes the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.

Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention. The legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. * * *

As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements.

See also 126 Cong. Rec. H1521 (daily ed. Mar. 4, 1980) (remarks of Rep. Holtzman); 125 Cong. Rec. H11967 (daily ed. Dec. 13, 1979) (remarks of Rep. Holtzman).

The Senate Report also states unequivocally that passage of the Refugee Act was intended to work no change in the standard by which an alien must prove eligibility for asylum relief (S. Rep. No. 96-256, 96th Cong., 1st Sess. 9 (1979) (emphasis added)):

As amended by the Committee, the bill establishes an asylum provision in the Immigration and Na-

> tionality Act for the first time by improving and clarifying the procedures for determining asylum claims filed by aliens who are physically present in the United States. *The substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in November 1969* [*sic*].

See also *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (remarks of David Martin, Office of the Legal Adviser, Department of State) ("For purposes of asylum, the provisions in this bill do not really change the standards").

This congressional design is confirmed by the conference reports, which explain that Section 243(h), as amended, was "based directly upon the language of the Protocol and [was] intended [to] be construed consistent with the Protocol." S. Rep. No. 96-590, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. No. 96-781, 96th Cong., 2d Sess. 20 (1980). See also 126 Cong. Rec. 3757-3758 (1980) (remarks of Sen. Kennedy).

By the same token, both the House and Senate reports make clear that the new definition of "refugee" contained in 8 U.S.C. (Supp. V) 1101(a)(42)(A) was intended simply to conform to the definition in the Protocol. H.R. Rep. No. 96-608, *supra*, at 9; S. Rep. No. 96-256, *supra*, at 4, 14-15.[36] Nowhere in the legislative history of the

---

[36] See also, *e.g.*, *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (remarks of Doris Meissner, Deputy Associate Attorney General, Department of Justice) ("[w]hat we have done in the Administration bill is simply incorporated the United Nations definitions for 'refugee'"); *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House*

Refugee Act is there any suggestion that the use of the phrase "well-founded fear of persecution" was intended to alter the standard by which an alien was required to prove eligibility for withholding of deportation or asylum. Rather, the legislative history indicates that the only change Congress contemplated would result from incorporation of the United Nations' definition was the elimination of the discrimination inherent in the ideological and geographical restrictions on conditional entry under former Section 203(a)(7), 8 U.S.C. 1153(a)(7).[37]

2. As we explained at the outset (page 22, *supra*), our discussion of pre-Refugee Act law is designed to elucidate, first, Congress's express intent, in enacting the relevant portions of the 1980 Act, to incorporate the provisions of the United Nations Protocol, and, second, Congress's use, in the 1980 legislation, of the Protocol's "well-founded fear" terminology. Hence, the fact that the Senate, in giving its advice and consent to accession

---

Comm. on the Judiciary, 96th Cong., 1st Sess. 43 (1979) (remarks of Dick Clark, Ambassador at Large and U.S. Coordinator for Refugee Affairs) (the bill "essentially adopts the definition of the United Nations Protocol Relating to the Status of Refugees").

[37] See, *e.g.*, *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House* marks of Doris Meissner, Deputy Associate Attorney General, Department of Justice) (new definition "supplants the definition in the immigration statute right now which limits 'refugee' to certain geographical areas of the world"); *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 27 (1979) (remarks of Rep. Fish) ("the fundamental change under the legislation, of course, is the replacing of the existing definition of refugee with the definition which appears in the United Nations Convention and Protocol on refugees, thus eliminating ideological and geographical limitations * * *"); S. Rep. No. 96-256, 96th Cong., 1st Sess. 15 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 1, 9 (1979); 126 Cong. Rec. H1520 (daily ed. Mar. 4, 1980) (remarks of Rep. Holtzman) ("[t]his new definition finally eliminates the geographical and ideological restrictions applicable to refugees contained in our law since 1952").

Comm. on Foreign Affairs, 96th Cong., 1st Sess. 71 (1979) (re-

to the Protocol in 1968, did not intend to alter the then prevailing standard by which an alien was required to prove eligibility for withholding of deportation makes clear that Congress, in incorporating the provisions of the Protocol in the Refugee Act, also did not intend to alter the pre-1968 standard.[38] In addition, the fact that

---

[38] More recent legislative history confirms that subsequent Congresses have been well aware of the basis on which this country acceded to the United Nations Protocol in 1968. In connection with its recent consideration of the proposed Immigration Reform and Control Act of 1982, the House reiterated the legislative understanding that the 1968 accession to the Protocol did not expand the substantive rights of aliens (H.R. Rep. No. 97-890 (Pt. 1), 97th Cong., 2d Sess. 51 (1983) (emphasis added)):

> By accession to the Protocol the United States agreed not to deport a refugee "to frontiers or [*sic*] territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion." *Some question has arisen as to whether the United States, by agreeing to the Protocol, intended to expand or modify the rights of aliens seeking asylum in the United States.* The Committee is convinced that nothing in present law, nor in [the proposed legislation], should be construed as providing less protection than the Protocol. That is, *the Committee views the Protocol as creating no substantive or procedural rights not already existing either under current* [*immigration*] *law* or under the law as modified by the Committee Amendment. *The Committee thus agrees with the holding in Pierre v. United States* [*supra,*] *wherein it is stated that "accession to the Protocol by the United States was neither intended to nor had the effect of substantially altering the statutory immigration scheme."*

See also *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 107 (1981) (remarks of Ira Kurzban, Counsel for the National Civil Liberties Committee and the Haitian Refugee Center, Inc.) ("[t]he present system requires that an alien show a 'clear probability' that he is a bona fide asylum applicant"). Such subsequent legislative history "does not establish definitively the meaning of an earlier enactment, but it does have persuasive value." *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 10.

the words "well-founded fear," as used in the United Nations Protocol, had been consistently construed as equivalent to the pre-1968 standard (whether that standard is denominated as "realistic likelihood" or "clear probability") further refutes any suggestion that Congress's use of those words in the 1980 Act was intended to denote a change from the previous standard.

Our inquiry thus ordinarily would be at an end. Nevertheless, in order to dispel any doubt, we address two additional points raised by the court below.

a. The Second Circuit viewed (Pet. App. 13a) the legal standard by which an alien was required to prove persecution or fear of persecution under former Section 203(a)(7) as "considerably less stringent than Section 243(h)'s 'clear probability' of persecution of a singled-out individual * * *." Accordingly, the court opined (Pet. App. 22a-23a) that "[s]ince the 1980 Act dictates that a uniform test of 'refugee' be applied to all aliens," and since "the general purpose of the Act is to regularize, not hinder," the entry "of refugees, * * * it would bring about wholly anomalous results to read the Act to impose a far more stringent legal test upon entry by refugees than had existed in prior law." The court of appeals' analysis is flawed in several respects.

In the first place, the cases on which the court of appeals relied do not support its assertion that the burden of proving "persecution or fear of persecution" under former Section 203(a)(7) was less stringent than the burden of proving a "clear probability of persecution" under Section 243(h). The thrust of *In re Tan*, 12 I. & N. Dec. 564 (1967), the only Board decision cited by the court, was the discretionary nature of the determination required of the Attorney General under Section 243(h) concerning whether the alien would be subject to persecution in the country to which he sought withholding of deportation (see 12 I. &. N. Dec. at 566, 568-569). It was the existence of this element of discretion that led the Board to reject the claim (*id.* at 569-570) "that an

alien deportee is required to do no more than meet the standards applied under Section 203(a)(7) of the Act when seeking relief under section 243(h)." Similarly, while *In re Ugricic*, 14 I. & N. Dec. 384 (Dist. Dir. 1972), referred to the applicable standard under Section 203(a)(7) as persecution or "good reason to fear persecution" (14 I. &. N. Dec. at 385-386), it gave no indication that that standard, as applied, was any less stringent than "clear probability" or any of the other formulations by which Section 243(h) claims had been evaluated. Indeed, as we noted above (note 34), the "good reason to fear" formulation incorporates the objective criteria that are the hallmark of the "clear probability" test.[39]

Moreover, even if the burden of proving "persecution or fear of persecution" under former Section 203(a)(7) was less demanding than that of proving a "clear probability of persecution" under Section 243(h), the court of appeals' conclusion that our construction of the Refugee Act imposes a more stringent test for entry than had existed under prior law is flawed because it fails to take account of the additional elements of proof required of an alien seeking conditional entry under former Section 203(a)(7). The courts in construing former Section 203(a)(7) recognized that an applicant for conditional entry was required to prove *both* that he had fled a Communist, Communist-dominated or Middle Eastern

---

[39] The court of appeals also relied (Pet. App. 13a) on *In re Adamska*, 12 I. & N. Dec. 201 (Reg. Comm. 1967). But that case involved (*id.* at 202) a comparison between "[t]he statutory standards for refugee status under section 203(a)(7)" and the *pre-1965* standard for withholding of deportation under Section 243(h)—that the alien "would be subject to physical persecution" in the country of deportation (see note 10, *supra*). Not surprisingly, in those circumstances the Regional Commissioner held that the denial of the alien's prior application for withholding of deportation was not dispositive of her Section 203(a)(7) application (12 I. & N. Dec. at 202): "The holding in 1960 that the applicant would not be subject to 'physical persecution' in Poland is not determinative of the issues in the present [Section 203(a)(7)] application."

country because of persecution or fear of persecution on account of race, religion, or political opinion, *and* that he was unable or unwilling to return to such country on account of race, religion, or political opinion. *Shubash* v. *INS*, 450 F.2d 345, 346 (9th Cir. 1971); *Ishak* v. *District Director*, 432 F. Supp 624, 626 (N.D. Ill. 1977). And in assessing the second prong of the applicant's proof—his claim of inability or unwillingness to return to his homeland on account of race, religion, or political opinion—the standard applied was whether the alien had established a "likelihood of persecution" or "probable persecution" in the country of deportation. See *Ishak* v. *District Director*, *supra*, 432 F. Supp. at 626. Those verbal formulations correspond to the standard that consistently has been applied to evaluate claims for withholding of deportation under Section 243(h).[40] Hence, even if one discrete element of the proof required of an applicant for conditional entry—"persecution or fear of persecution"—was less stringent than the "clear probability of persecution" standard imposed on those seeking withholding of deportation, the additional elements of proof required of a conditional entrant amounted to essentially the same showing required of an applicant for withholding relief.[41]

Finally, even if the court of appeals were correct in concluding that the standard for admission of refugees under new Section 207, 8 U.S.C. (Supp. V) 1157, is

---

[40] In fact, in applying these formulations, the *Ishak* court relied solely on cases decided under Section 243(h). See *Ishak* v. *District Director*, *supra*, 432 F. Supp. at 625, citing *Kashani* v. *INS*, *supra*; *Cisternas-Estay* v. *INS*, 531 F.2d 155 (3d Cir. 1976); *Shkukani* v. *INS*, 435 F.2d 1378 (8th Cir.), cert. denied, 403 U.S. 920 (1971); *Rosa* v. *INS*, 440 F.2d 100 (5th Cir. 1971); and *Chang Kai Fu* v. *INS*, *supra*.

[41] Indeed, *In re Taheri*, 14 I. & N. Dec. 27 (Reg. Comm. 1972), on remand, 14 I. & N. Dec. 35 (Reg. Comm. 1973), suggests that an alien who was ineligible for conditional entry because he could not show flight on account of persecution might nonetheless be eligible for withholding of deportation under Section 243(h). See 14 I. & N. Dec. at 30, 38.

somewhat more stringent than the standard for conditional entry under former Section 203(a)(7), the result would not be "anomalous." As noted above (page 12, *supra*), conditional entry relief under former Section 203(a)(7) was available to a narrowly circumscribed class of aliens, numerically as well as geographically and ideologically. As a consequence, the majority of refugees who entered the United States prior to 1980 did so under the Section 212(d)(5) "parole" authority. *Briefing on the Growing Refugee Problem: Implications for International Organizations: Hearing Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 10 (1979); S. Rep. No. 96-256, 96th Cong., 1st Sess. 1-2, 5-6 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 2, 4, 11 (1979). Not only was exercise of the parole authority wholly discretionary with the Attorney General, but also, even when it was exercised, it afforded a much narrower form of relief (see pages 12-13, *supra*). Thus, in focusing on the "more generous" standard for conditional entry under Section 203(a)(7), the Second Circuit ignored the fact that that provision was available to only a limited number of refugees fleeing specified categories of countries (see generally *U.S. Refugee Programs: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 17 (1980)), while the majority of refugees were subject to the vagaries of the parole system.

It was Congress's intent in the Refugee Act, however, to equalize the United States' policy toward refugees regardless of their homeland.[42] Indeed, one of

---

[42] See, *e.g.*, *Briefing on the Growing Refugee Problem: Implications for International Organizations: Hearing Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 21 (1979) (remarks of Dick Clark, U.S. Coordinator for Refugee Affairs and Ambassador-at-Large) (passage of the Refugee Act "would make all people — regardless of their ideology, regardless of their geography — eligible for the [refugee] program"); S. Rep. No. 96-256, 96th Cong., 1st Sess. 1 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 13 (1979); 125 Cong. Rec. 23240 (1979) (remarks of Sen. Boschwitz)

Congress's chief objectives in enacting the 1980 legislation was to repeal former Section 203(a)(7), particularly because of its discriminatory criteria. Congress filled the vacuum created by the elimination of that provision by incorporating in the Refugee Act the uniform definition of refugee contained in the United Nations Protocol (see legislative history cited in notes 36 & 37, *supra*).

In short, it is common ground that a significant impetus for the Refugee Act of 1980 was "Congress's sympathy to the plight of refugees * * *" (Pet. App. 22a).[43] But the court of appeals erred in construing Congress's concern as relating to the standard each individual alien must meet in order to establish eligibility for admission. To the contrary, Congress's intent in enacting the Refugee Act, and particularly in repealing Section 203(a)(7) and replacing it with a uniform definition of refugee, was to broaden the "pool" of aliens for whom refugee status would be even a possibility. If, by doing so, the burden of proof required of aliens previously eligible for conditional entry under Section 203(a)(7) was heightened by virtue of the elimination of a previous presumption in their favor, that was no "anomal[y.]" Rather, it was an inevitable byproduct of Congress's desire to offer refuge from persecution equally and nondiscriminatorily, within the constraints imposed by our inability to accommodate all of the world's oppressed.

b. The court of appeals also concluded (Pet. App. 16a) that a new burden of proof was required in withholding

---

("[i]f our commitment to help desperate, homeless people is sincere, we must be willing to help all in need of assistance despite their ideologies or countries of origin").

[43] The court of appeals' particular emphasis (Pet. App. 19a, 22a) on the plight of the "boat people," however, is misplaced. As Senator Kennedy, the primary sponsor of the Refugee Act, explained (125 Cong. Rec. 23234 (1979)): while the "current crisis of refugees in Indochina * * * underscored the need for the permanent structure and framework this legislation will bring to our refugee resettlement programs," the "reform legislation has been pending in various forms in Congress for some years."

cases because "standards developed in an era of discretionary authority require some adjustment." There is no merit to this peculiar suggestion.

To begin with, as we have shown above, the statutory language warrants no such change and the legislative history expressly precludes it. In addition, notwithstanding the discretionary cast of former Section 243(h), no alien found statutorily eligible for withholding of deportation under that provision was ever denied relief as a matter of administrative discretion. See *In re Dunar*, *supra*, 14 I. & N. Dec. at 321-323. The Board thus never considered that it possessed unfettered discretion under Section 243(h). Accordingly, the court of appeals' attack (Pet. App. 16a) on the " 'clear probability' " test as having "been initially articulated by the BIA as its preferred way of implementing what had been [its] wholly discretionary authority" is simply unfounded. See *Kashani* v. *INS*, *supra*, 547 F.2d at 379.[44]

E. The BIA's Construction Of The Refugee Act Of 1980 As Not Having Altered The Standard By Which An Alien Must Prove Eligibility For Withholding Of Deportation Is Entitled To Substantial Deference

"Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference * * *." *United States* v. *Clark*, 454 U.S. 555, 565 (1982). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Udall* v. *Tallman*, 380 U.S. 16 (1965). Accordingly, the Board's view of the standard by which an alien must prove eligibility for relief under 8 U.S.C. (Supp. V) 1253(h), as expressed in cases it decided subsequent to enactment of the Refugee Act, is entitled to substantial weight.[45]

---

[44] What is more, as noted above (page 25, *supra*), it was not the Board but the courts that initially articulated the "clear probability" test.

[45] With certain exceptions not relevant here, the Attorney General is charged with the administration and enforcement of the Immigration and Nationality Act, 8 U.S.C. 1103(a). He, in turn,

Cognizant of Congress's intent in the Refugee Act not to alter the standard by which an alien must establish eligibility for relief under Section 243(h) (see pages 36-40, *supra*), the Board, since enactment of that legislation, has continued to use the phrases "clear probability of persecution" and "likelihood of persecution" as well as "well-founded fear of persecution" to describe that standard. See, *e.g.*, *In re Exilus*, Interim Dec. No. 2914 (BIA Aug. 3, 1982), slip op. 3-4 ("well-founded fear of persecution" and "likelihood of persecution"); Pet. App. 31a ("clear probability of persecution to be directed at the individual respondent"); *Rejaie* v. *INS*, *supra*, 691 F.2d at 140 (Pet. App. 38a), quoting the Board (" 'clear probability of persecution' "); *In re Martinez-Romero*, Interim Dec. No. 2872 (BIA June 30, 1981), slip op. 6-7 ("clear probability" and "well-founded fear"), aff'd, *Martinez-Romero* v. *INS*, 692 F.2d 595 (9th Cir. 1982); *In re Lam*, Interim Dec. No. 2857 (BIA Mar. 24, 1981), slip op. 3-4 ("clear probability" used by immigration judge; "well-founded fear" used by the Board); *In re McMullen*, 17 I. & N. Dec. 542, 544-546 (BIA 1980) ("clear probability" and "likelihood of * * * persecution"), rev'd on other grounds, *McMullen* v. *INS*, 658 F.2d 1312 (9th Cir. 1981). Moreover, regardless of how they are labeled, the Board has made clear that the criteria by which it evaluates withholding or asylum claims have not changed since passage of the Refugee Act. (*In re Martinez-Romero*, *supra*, slip op. 6-7):

> [G]eneralized undocumented assertions regarding claims of persecution ordinarily will not be sufficient to support a motion to reopen [to apply for withholding relief]. *See generally Matter of Chumpitazi*, 16 I&N Dec. 629 (BIA 1978). Similarly,

---

has delegated to the Board appellate authority over decisions of special inquiry officers in deportation, including withholding of deportation, cases (see 8 C.F.R. 3.1(b)(2), 242.17(c)). The Board's decisions are final unless referred to the Attorney General (8 C.F.R. 3.1(d)(2) and (h)).

> general allegations of political upheaval which affect the populace as a whole are insufficient to warrant reopening. *See generally Fleurinor* v. *INS*, 585 F.2d 129 (5 Cir. 1978); *Matter of Diaz*, 10 I&N Dec. 199 (BIA 1963); *see also Matter of McMullen, supra.* Evidence presented in support of a claim of persecution must demonstrate a clear probability of persecution directed at *the individual* [*alien*] *or a class to which the individual* [*alien*] *belongs. Cheng Kai Fu* v. *INS, supra*; *Matter of Chumpitazi, supra.* Evidence such as newspaper articles will be considered in evaluating a claim of persecution. However, this type of evidence normally is not significantly probative on the issue of whether *a particular alien* would be subject to persecution if deported. *See Matter of McMullen, supra.*

See also *Rejaie* v. *INS, supra*, 691 F.2d at 145 (Pet. App. 50a).

At least as applied, therefore, the terms "well-founded fear" and "clear probability" have always been equivalent. The Second Circuit's holding that the "well-founded fear" language in the Refugee Act of 1980 requires withholding of deportation under Section 243(h) upon a showing "far short of a 'clear probability' that an individual will be singled out for persecution" (Pet. App. 23a) thus liberalizes significantly the standard by which aliens' claims must now be assessed. In so doing, the court of appeals worked a fundamental change in the substance of our withholding and asylum law, in direct contravention of the intent underlying both the United States' accession to the Protocol in 1968 and the enactment of the Refugee Act of 1980. Such a flagrant violation of express legislative intent should not be permitted to stand.[46]

---

[46] The court of appeals acted particularly irresponsibly in striking down the standard that the Board and the INS have consistently employed without providing any guidance concerning what it would consider to be an appropriate alternative (see pages 6-7 & note 8, *supra*). The court's bare suggestions (Pet. App. 15a, 23a)

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to that court for disposition of respondent's petition for review under the standard that has been consistently applied by the Board.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

BARBARA E. ETKIND
Assistant to the Solicitor General

MARGARET J. PERRY
Attorney

ANDRE M. SURENA
Office of the Legal Adviser
Department of State

JUNE 1983

---

that the proper standard "is somewhat more generous than the BIA's administrative practice" and is satisfied by "a showing far short of a 'clear probability' " are singularly unenlightening to immigration authorities charged with the task of ruling on withholding and asylum applications. Hence, even if the INS and the Board were to evaluate all post-Refugee Act claims in view of the decision below, there is no assurance that such an attempt would satisfy the Second Circuit or would not result in further remands to the Board until that body happened upon the particular standard contemplated by the court of appeals. In addition to thwarting the will of Congress, therefore, affirmance of the decision below would impose substantial burdens in the administration of our immigration laws.

APPENDIX

Representative sample of cases decided subsequent to accession to the Protocol but prior to passage of the Refugee Act of 1980 in which withholding of deportation relief was denied:

1. *Fleurinor* v. *INS*, 585 F.2d 129, 134 (5th Cir. 1978)—withholding of deportation to Haiti not warranted by evidence that, in 1970, the alien was arrested by the semi-official secret police because of their belief that he had taken part in an invasion of Haiti launched from the Bahamas, where the alien had not taken part in any such invasion, where Haiti subsequently issued the alien a passport and permitted him to return to the Bahamas, where none of the alien's family who resided in Haiti had been arrested or harmed by the government, and where there was no evidence "that the Haitian government has any interest in [the alien] today, eight years after the supposed arrest."

2. *Henry* v. *INS*, 552 F.2d 130, 131-132 (5th Cir. 1977)—in the absence of any evidence of political activism on the part of either the aliens or any members of their families, the aliens' conclusory allegation that the Haitian government receives with hostility citizens returning from abroad does not warrant withholding of deportation.

3. *Pereira-Diaz* v. *INS*, 551 F.2d 1149, 1154 (9th Cir. 1977)—essentially undocumented statements of alien's belief that he would be threatened by communists if he were deported to Portugal, which the immigration judge disbelieved, did not warrant withholding of deportation.

4. *Kashani* v. *INS*, 547 F.2d 376, 380 (7th Cir. 1977)—alien's motion to reopen deportation proceedings in order to apply for relief under Section 243(h) and the United Nations Protocol was properly denied in the absence of any objective evidence that he had participated in

demonstrations against the Shah or had written letters and articles voicing opposition to the Iranian government.

5. *Zamora* v. *INS*, 534 F.2d 1055, 1063 (2d Cir. 1976) —evidence that Philippine aliens had participated in 1969 or 1970 in anti-government demonstrations for which *other* participants had been arrested and that their cousin was married to the nephew of an imprisoned Philippine senator did not warrant withholding of deportation where the aliens themselves had never been arrested and subsequently had been permitted to leave the Philippines and where the cousin and nephew had never been persecuted.

6. *Khalil* v. *INS*, 457 F.2d 1276, 1278 (9th Cir. 1972) —withholding of deportation not warranted by the alien's fears that she would be persecuted if returned to Egypt, in the absence of any "factual support which might have demonstrated the reasonableness" of her belief.

7. *Rosa* v. *INS*, 440 F.2d 100 (1st Cir. 1971)—alien's assertion that, if returned to the Dominican Republic, he would be persecuted on account of his employment 10 years earlier as a police sergeant under the Trujillo regime, supported only by a conclusory affidavit based largely on hearsay, did not establish a clear probability that the alien would be subject to persecution if deported.

8. *Shkukani* v. *INS*, 435 F.2d 1378 (8th Cir.), cert. denied, 403 U.S. 920 (1971)—Jordanian citizen's subjective fear that, because his family and friends lived in Israeli-occupied territory and because he had not supported any Arab guerilla movement, he might be considered an enemy, supported by a conclusory affidavit by an American professor and a *New York Times Magazine* article describing the general conditions in occupied Jordan, did not establish the probability that the alien would be persecuted if returned to Jordan.

9. *Gena* v. *INS*, 424 F.2d 227, 233 (5th Cir. 1970)— alien's conclusory assertion that he would be subject to persecution if deported to Haiti because his political

views were opposed to those of the Duvalier regime insufficient ground for reopening deportation proceedings.

10. *In re Williams*, 16 I. & N. Dec. 697, 700 (BIA 1979)—withholding of deportation to Haiti not warranted by alien's claim that, in 1968, her uncle was arrested by the Ton Ton Macoute, jailed and mistreated, as a result of which he subsequently died, where there was "[a]bsent from [the] proof * * * any basis for believing that the Haitian Government had any interest in her status."

11. *In re Chumpitazi*, 16 I. & N. Dec. 629, 634 (BIA 1978)—generalized, undocumented assertions of a dictatorship in Peru combined with newspaper articles describing political conditions there during a recent strike did not warrant withholding of deportation.

12. *In re Francois*, 15 I. & N. Dec. 534, 539 (BIA 1975)—evidence that, in 1960, the alien's father, a supporter of the government that preceded the Duvalier regime, was murdered on account of his political opinion, that, in 1968, alien's stepfather, a Haitian refugee, was murdered upon his return to Haiti and that other family members have been murdered in Haiti did not establish a "well-founded fear" of persecution where the alien had no contact with Haiti since he left that country shortly after his father's death, where he had not been politically active, and where he "has not demonstrated any reason why the government of Haiti might be interested in him at this time."

13. *In re Mladineo*, 14 I. & N. Dec. 591, 592 (BIA 1974)—alien's "conclusory declaration that she had suffered economic and employment privation in Chile because of her refusal to become a Socialist or a Communist" did not make out a prima facie showing that her fear of persecution in Chile was well-founded, especially since the prevailing regime was anti-Socialist and anti-Communist.

14. *In re Bohmwald*, 14 I. & N. Dec. 408, 409 (BIA 1973)—conclusory allegations that alien would be perse-

cuted in Chile because of his opposition to the Communist form of government and because he could not practice Catholicism there did not constitute a "*prima facie* showing that [the alien] has a well-founded fear of persecution in Chile."

15. *In re Surzycki*, 13 I. & N. Dec. 261, 262 (BIA 1969)—withholding of deportation to Poland not available to an alien whose sole claim of "persecution" was that, because of an "anti-intellectual climate" in that country, he would be punished if he expressed himself freely; such an alien "is in no different position than any other Polish person in Poland, and there is nothing * * * to show he would in any way be singled out for persecution as claimed."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 407909 1